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The European Union's Rule of Law Promotion in its Neighbourhood: A Structural Foreign Policy Analysis

Raphaël Metais, Charles Thépaut & Stephan Keukeleire (eds.)



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Abstract

The promotion of the rule of law has become an important dimension of the European Union's relations towards its neighbourhood. The rule of law is, however, a complex and multifaceted notion and the EU's rule of law promotion policy has often been criticised for being either inefficient or self-interested. This collection of short papers offers an analysis of various case studies using the analytical framework of structural foreign policy (SFP) developed by Stephan Keukeleire. It aims to promote an original analytical perspective on the EU's foreign policy but also to critically test and further develop the SFP analytical framework. The contributions of this collection consist of the shortened version of students' Master's theses written at the College of Europe during the academic year 2011-2012 in the framework of the course "The EU as a Foreign Policy Actor" taught by Stephan Keukeleire, Chairholder of the TOTAL Chair of EU Foreign Policy in the Department of EU International Relations and Diplomacy Studies.

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3. Promoting Justice Abroad: An Analysis of the EU's Rule of Law Promotion in Ukraine as Structural Foreign Policy

Daan Fonck

Introduction

Since Ukraine's independence in 1991, the Rule of Law (RoL) has been facing extreme perils, struggling to leave behind 60 years of totalitarian rule, and muddling through a very unstable political pathway of post-Communist transformation. Eight years after the Orange Revolution hopeful signals seem more distant than ever. The controversial case of Yulia Tymoshenko has come to stand as a symbol for the continuous application of 'selective justice' by the Ukrainian political elite.

In this essay, we aim to examine how committed the EU has been in fostering the RoL in Ukraine, the so-called 'pioneer' of the European Neighbourhood Policy (ENP). By applying the structural foreign policy (SFP) framework, we focus on the *outcomes* of RoL promotion, thereby taking up an explicit 'outside-in' perspective. After updating the SFP conceptual framework, we shortly look at the EU's approach to RoL promotion, before turning to the actual RoL reform record in Ukraine.

Updating the Structural Foreign Policy Framework

Operationalising the 'Rule of Law' and Defining the Independence of the Judiciary

Definitions of the RoL vary according to contextual factors and from author to author;¹ it is an 'essentially contested concept'.² Following Kaplan, we argue that any conceptualisation must purposefully serve the theoretical approach we apply,³ that is, structural foreign policy. Against this background, the classic distinction made by Craig (among others) between *formal* and *substantial* RoL seems particularly relevant as it goes hand in hand with the distinction between *conventional* and *structural* foreign policy (see Introduction).⁴ A formal conception of the RoL essentially prescribes the separation of law from politics and the accompanying conditions ensuring that separation. A substantial definition, on the other hand, goes

¹ A. Bedner, "An Elementary Approach to the Rule of Law", *Hague Journal on the Rule of Law*, vol. 2, no. 1, 2010, p. 48.

² R. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", *Columbia Law Review*, vol. 97, no. 1, 2007, p. 6.

³ A. Kaplan, *The Conduct of Inquiry: Methodology for Behavioral Science*, San Francisco, Chandler, 1964, pp. 51-53.

⁴ P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", *Public Law*, vol. 20, no. 4, 1997, pp. 467-487.

beyond these procedural or formal aspects, and implies in particular that rights and liberties are guaranteed. It means that the RoL is internalised as a permanent organising principle for attaining justice.

The independent judiciary system is the primary guardian or controlling mechanism of the RoL.⁵ Both policy-makers as well as academics generally follow the mantra that judicial independence protects and enhances the RoL, and that its viability is enhanced in a democratic environment. We claim that a strong distinction between *de jure* and *de facto* independence of the judiciary should be made and that the very independence of the judiciary can only be assessed by looking at its outcome. From the citizen's point of view, an independent judiciary system translates essentially in the right to a fair trial. This implies aspects such as a reasonable procedural period, 'access to justice', an impartial prosecutor, and the effective implementation of judicial decisions. In our analysis, we will adopt a substantial perspective towards judicial independence that enables us to 'check' the actual internalisation of the RoL, looking beyond *de jure* independence.

Rule of Law Promotion as Structural Foreign Policy

Table 1 displays a typology of RoL promotion conceptualised as SFP. Rather than a strict theoretical model, the table aims to illustrate the operationalisation of the SFP framework for the EU's promotion of an independent judiciary.

Table 1: Updated Typology – Dominant vs. Neglected Dimensions of Foreign Policy

	Conventional RoL Promotion		Structural RoL Promotion
Actors	states		non-state actors: EU, civil society, NGOs
Interests and objectives	self-regarding interests: Justice and Home Affairs agenda	collective interests	other-regarding interests: Judicial Independence
Security	territorial security and stability		collective and human security
Power and capabilities	material and hard power		immaterial and soft power
Means	hierarchy, no ownership, exclusive, unilateral		horizontal relationship, local ownership, inclusiveness
Focus	procedural RoL promotion		substantive RoL promotion
Policy Indicators	strengthening executive law enforcement, procuration, JHA externalisation	strengthening administrative capacity	strengthening judicial independence, access to justice

Source: compiled by the author.

⁵ Bedner, *op.cit.*, p. 67.

This typology represents a continuum rather than a clear distinction and that both categories are complementary rather than exclusionary. The 'policy indicators' give us an idea of what type of RoL promotion policies correspond to both dimensions. The *interests* and *security* dimensions need further explanation.

Interests and Objectives

In terms of interests, reference is made to George and Keohane's concepts of self-regarding interests, collective interests, and other-regarding interests.⁶ As for the objectives, we use the distinction made by Cremona⁷ and Wichmann⁸, who split up the external dimension of the EU's fundamental values – such as the RoL – in constitutive and instrumentalist interpretations. Following the former, the promotion of the RoL is an objective in its own right as it reflects the promotion of internal values that constitute the Union's own identity. According to the latter, the RoL agenda serves other foreign policy goals related to (self-interested) economic or security and stability interests.

Security

The policy issues of migration, terrorism and cross-border crime show that internal and external security dimensions are intertwined. Consequently, the EU's self-interested security interests of RoL promotion take place in the European neighbourhood through the so-called external dimension of the Justice and Home Affairs (ED-JHA) policies.⁹ This 'conventional' promotion of the RoL, or rather of 'rule and order', is clearly self-interested since it explicitly aims to ensure internal stability and security through foreign policy. A 'structural' RoL promotion, on the contrary, implies the promotion of security for the individual against arbitrariness of the state and guarantees legal certainty.

However, strengthening conventional security *could* also be structural, as it provides the necessary 'security umbrella' in which the RoL can develop in a structural way. Indeed, it is only by strengthening the executive law enforcement (making sure that

⁶ A.L. George & R.O. Keohane, "The Concept of National Interests: Uses and Limitations", in A.L. George (ed.), *Presidential Decision-making in Foreign Policy: The Effective Use of Information and Advice*, Boulder, Westview Press, 1980, pp. 221, 230.

⁷ M. Cremona, "Values in the EU Constitution: the External Dimension", *Working Paper*, no. 26, CDDRL, Stanford Institute for International Studies, November 2004.

⁸ N. Wichmann, *Rule of Law Promotion in the European Neighbourhood Policy: Normative or Strategic Power Europe?*, Baden-Baden, Nomos, 2010, pp. 15-37.

⁹ See T. Balzacq, *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security*, Basingstoke, Palgrave Macmillan, 2009.

criminals are arrested and effectively prosecuted by the procuration) that the acts of an independent judiciary can have their merit.

Measuring Internalisation: 'Layers of Impact'

A final update to the SFP framework is the qualification of the degree of 'internalisation' of the RoL. In order not to limit ourselves to legal and institutional change, but to include behavioural change, we take over the '*layers of impact*' model designed by Morlino and Magen as a guideline for our empirical analysis.¹⁰ The model differentiates between three 'layers' of impact an external actor can have on the domestic level: Rule Adoption (RA), meaning the transposition of rules, standards and norms into domestic legislation; Rule Implementation (RImp), or the transformation of governing institutions and administrative structures that need to implement changes; and finally, Rule Internalisation (RInt), which is the very acceptance of the transferred rules by the elite as well as the population. The instigation of this chain of impact is dependent on a credible commitment of the international actor (EU) on the one hand, and on political will of change agents within the target country (Ukraine) on the other hand. Moreover, a shift in the cost-benefit analysis in favour of the promoted rules and institutions is needed to make decision-makers opt for RA.

Figure 1 below displays an updated SFP matrix, indicating the sectors and levels this essay will concentrate on, extended with the three layers of impact model.

¹⁰ L. Morlino & A. Magen, "Methods of influence, layers of impact, cycles of change", in A. Magen & L. Morlino (eds.), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*, Abingdon, Routledge, 2009, pp. 39-50. The model is simplified.

Figure 1: Updated Structural Foreign Policy Matrix

Structures		SECTORS			INTERNALIZATION
		POLITICAL	LEGAL	SOCIAL	
LEVELS	INDIVIDUAL/ SOCIETAL	Access to justice, right to a fair trial		Trust, public confidence in an independent judiciary	R/L
	STATE	Clear separation of judiciary from political influence	Legislative and procedural guarantees for an independent judiciary	Political culture accepting the rule of law	R/Imp R/Lot

Source: compiled by the author.

Inside-out: Is the EU's Promotion of Rule of Law *à la carte*?

When the EU promotes RoL in Ukraine, does it follow a conventional or rather a structural foreign policy approach? Does the 'constitutive' or the 'instrumentalist' RoL promotion objectives prevail? The analysis of the relevant EU programming documents for Ukraine show that the EU's approach depends both on the *policy field* and the *policy framework*.¹¹

The ENP: Between 'Constitutive' Values and Self-Regarding Interests

The relevant ENP programming documents¹² predominantly maintain a 'constitutive' vision on the RoL: it is promoted as an objective in its own right. However, the reform of the judiciary is also often mentioned as an instrument for addressing (self-interested) 'security concerns' such as terrorism, organised crime, trafficking in drugs and arms, as well as an instrument to strengthen cooperation in migration and asylum. Very recently, in the aftermath of the Arab uprisings, the RoL promotion agenda has become much more 'substantial' as it aims to build 'deep democracy', where "the rule of law [is] administered by an independent judiciary and right to a

¹¹ Wichmann, *op.cit.*, pp. 52-85.

¹² These are the general neighbourhood strategy papers, the EU-Ukraine Action Plan, the EU-Ukraine Association Agenda, the Country Strategy Papers, and the National Indicative Programmes.

fair trial".¹³ Nevertheless, the state-focused and institutionalist bias of policy interventions is heavily present and thus "undermines the milieu goal character".¹⁴

The 'Developmental' Approach of the EIDHR

The European Instrument for Democracy and Human Rights (EIDHR) is a thematic instrument aimed at providing support for the promotion of democracy and human rights. The EIDHR adopts a developmental approach since it works exclusively through civil society organisations active in the promotion of these values.¹⁵ Therefore, the degree of inclusiveness and local ownership is high. EIDHR clearly promotes the RoL as a 'constitutive' value by stressing the independence of the judiciary in terms of equality before the law and access to justice.¹⁶

The JHA Agenda: 'Instrumental' Means for Self-Regarding Interests

The ED-JHA is by nature a self-interested policy, which makes the RoL promotion an 'instrumental' objective. Within this policy field, the strengthening of the judiciary is consistently set out in terms of efficiency as it is needed to complement the EU's internal security agenda for fighting crime and terrorism.¹⁷ The interaction between the EU and Ukraine is organised on an intergovernmental level through political dialogue and maintains a conditionality-like or rational 'cost-benefit' methodology.

An Outside-in Perspective on Rule of Law Promotion in Ukraine

The State of the RoL in post-Soviet Ukraine

Within the Soviet system, political, legal, economic and ideological powers were fused and monopolised by the communist party. The politico-legal paradigm of 'socialist legality' served to protect this system and stood in direct contrast with the 'capitalist' principle of the RoL. It made the law a subservient institution to sustain the

¹³ Commission of the European Communities & High Representative of the European Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A New Response to a Changing Neighbourhood*, COM(2011) 303, 25 May 2011, p. 3.

¹⁴ Wichmann, *op.cit.*, p. 63.

¹⁵ Directorate-General Development and Cooperation – EuropeAid, "The European Instrument for Democracy & Human Rights", 17 February 2012.

¹⁶ Wichmann, *op.cit.*, pp. 71-72.

¹⁷ *Ibid.*, p. 176.

regime and to direct a political course.¹⁸ Therefore, Ukraine's transition towards a democratic regime faces three main challenges as far as the establishment of a fully independent judiciary guarding the separation of powers is concerned.

Firstly, the judicial branch is still underdeveloped. Interestingly, the politics of 'rule by law' in the Soviet system provided a frame of stability, structure and discipline for the judicial system and gave it the means to create and shape order in society (albeit in a dictatorial way). The collapse of the Soviet regime resulted in a 'legal vacuum' with no Ukrainian legal traditions and institutions to fill up the gap. The disappearance of this top-down system meant that the judiciary could not rely anymore on the executive power which previously guaranteed its institutional capacity.¹⁹ The training of judges needs to be adapted to modern standards so as to set up a system in which the decision for selection or promotion of judges is based on merit and competence and no longer on political loyalty.²⁰

Secondly, within the executive branch, the old instinct remains as if the judicial apparatus was part of a unified state structure and in fact an instrument of government policy.²¹ This applies particularly to the prosecutor-general's office which was during Soviet times the most important supportive institution of the Communist Party.²²

Thirdly, and probably most importantly, there is a need to overcome an old legal culture, where the law is no longer being thought of as the 'will of the rulers', but as the 'will of the people'. This change is needed in the minds of the elite as much as in that of the citizens, since the law derives its legitimacy and enforcement mainly through voluntary compliance.²³

In short, the collapse of the Soviet-Union was anything but a simple and strict legal problem for the RoL and the judiciary. There is a need for a simultaneous and comprehensive shift in political, legal and societal sectors, at individual, societal,

¹⁸ H. Oda, "The Emergence of *Pravovoe Gosudarstvo* (Rechtsstaat) in Russia", *Review of Central and East European Law*, vol. 25, no. 3, 1999, pp. 373-374.

¹⁹ Interview with Arkadiy Bushchenko, executive director of the Ukrainian Helsinki Human Rights Union, Kiev, 27 March, 2012.

²⁰ K. Hendley, *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union*, Ann Arbor, University of Michigan Press, 1996, p. 124.

²¹ P. D'Anieri, "What Has Changed in Ukrainian Politics? Assessing the Implications of the Orange Revolution", *Problems of Post-Communism*, vol. 52, no. 5, 2005, p. 90.

²² K. Malfliet, *De geest van het russische recht*, Leuven, Acco, 2010, p. 80.

²³ K. Ratushny, "Toward the 'independence... of judges' in Ukraine?", *Saskatchewan Law Review*, vol. 62, 1999, p. 583.

professional and elite levels (police and civil servants, the parliament, businessmen, law schools, judges, and ordinary citizens), indicating a collective action problem. The old habit of political interference in the judicial branch needs to be broken. At the same time, the judicial sector needs institution- and capacity-building. Moreover, these changes can only sustain for as long as they are accompanied by a simultaneous change of legal culture.

Two Decades of Justice Reform in Ukraine: Neglecting the Political Sector

In this final part we investigate to which extent the EU's RoL promotion activities have led to structural outcomes. We make use of the analytical framework and adjacent concepts of RA, RImp, and RInt so as to illustrate the degree of 'internalisation' of RoL promotion.

Until 2004, Ukraine's commitment to the independent judiciary was very weak, and EU-Ukraine relations were in general quite cold under President Kuchma (1994-2004). As in the 1990s the EU predominantly focused on the preparation of the Central and Eastern European countries for their accession to the EU, the Council of Europe was the major external actor promoting judicial reform in Ukraine. It was partly because of the latter's extensive pressure that some 'small justice reforms' were adopted in 2002. Relations with Kuchma stagnated during his second term when he pursued an increasingly authoritarian rule. On a judicial level, it meant there was almost no progress, since the oligarchic clans that came to organise themselves around Kuchma captured the courts. As a consequence, he vetoed many draft laws on strengthening judicial independence.²⁴ Soviet practices remained recurrent as the judiciary was often treated as being part of the civil service and continuously received instructions.²⁵

From Kuchma's rule onwards, EU-Ukraine relations also became complicated by the 'membership issue'. Both sides were no longer on the same wave length, Kiev was waiting for a clear membership commitment from Brussels to encourage reform, whereas Brussels demanded an improvement of Ukraine's record of reform before

²⁴ T. Kuzio, "Is Ukraine Part of Europe's Future?", *The Washington Quarterly*, vol. 29, no. 3, 2006, p. 89.

²⁴ D'Anieri, *op.cit.*, p. 90.

²⁵ H. van Zon, "Political Culture and Neo-Patrimonialism Under Leonid Kuchma", *Problems of Post-Communism*, vol. 52, no. 5, 2005, p. 16.

opening the door of accession.²⁶ Knowing that the first phase of 'Rule Adoption' (RA) is dependent on both credible commitment of the EU and the political will of the Ukrainian political elite, it is therefore clear that all three phases of RA, RImp, and RInt were unthinkable until 2004.

This started to change slightly in 2004 when the EU launched the ENP and things evolved in Kiev. The Orange Revolution brought a pro-EU and pro-democratic government to power. This period was of great significance for the independence of the judiciary. As many millions took the streets to protest against the fraudulent elections, the Supreme Court found the courage to nullify the second round of the presidential elections. All sides in the dispute, as well as the citizens, accepted the independent role of the Court.²⁷ However, soon it became clear that, despite glorifying words of democratic change, practices of politicisation of the judicial system persisted and reforms were not implemented. Within society, feelings of hope were soon replaced by feelings of disillusionment and cynicism.

Nevertheless, under the pressure of the EU and the Council of Europe, some initial RA was triggered. In November 2005, a Decree of President Yushchenko set up a 'National Commission on Strengthening Democracy and Rule of Law'. This resulted a year later in the approval of a 'Strategy Plan for improving the justice system to ensure the right to a fair trial' and the draft 'Law on the Reform of the Judiciary'. Yet, notwithstanding continuous promises, the president and parliament did not succeed in adopting any final legislation. Especially in areas of political corruption or abuse of office, no progress was made, resulting in a continued selective or arbitrary attitude towards the law.²⁸ Judicial independence reached an all-time low during the 2007 Constitutional Crisis, when President Yushchenko fired several judges of the Constitutional Court, who wanted to annul his decision to dissolve the parliament.²⁹

With the election of Yanukovych in 2010, the political will on Ukrainian side further decreased when the new president slowed down the European integration course. However, the *Rada* did adopt the long-prepared 'Law on the Judiciary and the Status of Judges'.³⁰ The Yanukovych administration largely took over the existing concept law, yet excluded essential provisions or amended others, which distorted

²⁶ Kuzio, *op.cit.*, p. 92.

²⁷ D'Anieri, *op.cit.*, p. 90.

²⁸ *Ibid.*

²⁹ A. Trochev, "Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine", *Demokratizatsiya*, vol. 18, no. 2, 2010, pp. 134-135.

³⁰ B. Futey, "Law on the judiciary and the status of judges in Ukraine", US-Ukraine Foundation, *Commentary*, 14 October 2010.

its whole strength. In fact, it was clearly an intent to facilitate pressure on the judiciary.³¹ In short, whereas the 2010 legislation on the judiciary finally signalled the initiation of effective RA in justice reform, it is clear that the government tried to maintain, if not increase, its *de facto* influence on the courts. Thus far no serious phases of RImp, let alone RInt, have taken place in the judicial sector.

It is clear that the continuous politically unstable climate is to a large extent an obstacle for serious reforms of the judiciary. Trochev argues that the EU, just as many other Western aid providers, was misled by the post-Orange leadership. They became entrapped in their 'narrow' judicial sector support.³² Ukraine is no stand-alone case in which international RoL aid providers become 'entrapped' in their strong institutional fixation. An often-cited problem considers the programmes that provide computers and software to improve the efficiency of case management. These systems can be manipulated, so that the improved speed of case assignment might aggravate rather than improve the independence of the judiciary.³³ Similar observations by RoL promoters in Ukraine were made where computerised case assignment software could be manually bypassed to assign a judge to a case.³⁴ A second example is the setting up of semi-autonomous judicial councils in the selection and appointment process of judges. In Ukraine, this 'High Council of Justice' is strongly populated by executive and parliamentary representatives and has in fact become one of the main levers through which both branches try to influence judges.³⁵ Without tackling the political sector, trying to build judicial independence through institutions is like trying to dry out a flooded room without turning off the taps: "the underlying maladies of the original institutions end up crossing over and infecting the new institutions"³⁶.

Conclusion

The EU's conception of RoL promotion is rather dependent on the goal it is serving: in a JHA context, the RoL takes the form of an instrument serving security concerns, whereas in the ENP framework, the RoL and independence of the judiciary is presented more as a constitutive value or as a goal in itself.

³¹ Interview with Arakdiy Bushchenko, *op.cit.*

³² Trochev, *op.cit.*, p. 128.

³³ T. Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge", *Working Paper No. 34*, Carnegie Endowment for International Peace, January 2003, p. 10.

³⁴ M. Zimmer, "Courts flout case selection law for judges", *KyivPost*, 1 March 2012.

³⁵ Interview with N. Vereshchinska, Director of the Centre of Judicial Studies, Kiev, 27 March 2012.

³⁶ Carothers, *op.cit.*, p. 11.

The EU's structural RoL promotion is, however, limited to the first phase of rule adoption, far from the phases of actual internalisation. This indicates a lack of political will on the Ukrainian side as well as a lack of credible commitment of the EU. A study of the Ramzukov Centre on the implementation of the EU-Ukraine Action Plan indeed confirms that despite some considerable success in certain sectors, the judicial branch and corruption remained one of the most problematic areas, requiring the strongest political capital.³⁷

The main activity of the EU is still based on political dialogue with the government as main contact.³⁸ This 'conventional' RoL promotion, with a preference for top-down programmes where governments – instead of the civil society – are the principal partners, neglect the fact that this approach is not the most efficient. In that sense, our case further confirms Goldston's general observation that there exists some general negligence by RoL donors that 'partner' governments can sometimes be the very obstacle to reform.³⁹

The EU's RoL promotion lacks a 'comprehensive' approach. It looks at the institution of 'law' in a narrow, institutionalist and instrumentalist way. Judicial reform programmes were not tackling the political sector, where continued 'selective use of justice' is the main cause for judicial dependence. Therefore, judicial support initiatives risk being inefficient since the problem of political capture has not been overcome. This limitation is of course inherent to the limited ambition of the ENP. As it tries to organise intense external relationships with neighbours, but offers no membership prospects, the EU has no real leverage to address this political dimension. Although the EU helped to foster the maturation of the judicial sector, the observed collective action problem of judicial independence teaches us that no real improvement is to be expected as long as the political elite cannot be brought to respect the RoL.

³⁷ Ramzukov Centre, *Ukraine-EU: From the Action Plan to an Enhance Agreement*, op.cit., pp. 146-172.

³⁸ Interview with operational expert at the Delegation of the European Union to Ukraine, Kiev, 29 March 2012.

³⁹ Goldston, James, "The Rule of Law at Home and Abroad", *Hague Journal of the Rule of Law*, vol. 1, no. 1, 2009, pp. 41-42.